Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 79-384

ROBERT J. BENSON,
Petitioner

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
Respondent

v.

ATLANTIC & GULF STEVEDORES, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GEORGE J. O'NEILL
Suite 1600 Broad-Locust Building
1405 Locust Street
Philadelphia, Pennsylvania 19102

Attorney for Petitioner

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SUPREME COURT OF THE UNITED STATES
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NO.

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v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Robert J. Benson, petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit in the entitled case rendered on June 8, 1979.

OPINIONS BELOW

The Court of Appeals for the Third Circuit did not file an opinion. Its judgment order appears as Benson v. American Export Isbr. Lines, Inc. et al., No. 78-2213 (3d Cir., decided June 8, 1979).

The District Court's Order and Memorandum is also unreported. It appears as Benson v. American Export Isbr. Lines, Inc. et al., Civil Action No. 68-1387 (E.D. Pa., decided July 12, 1978). The order and memorandum of the

District Court and the judgment order of the Court of Appeals are printed in the appendix to this petition.

JURISDICTION

Petitioner seeks review of the judgment order of the United States Court of Appeals for the Third Circuit, dated June 8, 1979, and the order of the United States District Court for the Eastern District of Pennsylvania, dated July 12, 1978, which it affirmed.

Jurisdiction is conferred upon the Supreme Court by Title 28, U.S. Code, Section 1254(1)

QUESTION PRESENTED

Did the District Court and the Court of Appeals deprive a longshoreman and his counsel of property without due process of law in violation of the Fifth Amendment by ordering that a personal injury judgment in favor of the longshoreman against a shipowner should be marked "satisfied" and execution thereon should be stayed pursuant to the employer-stevedore's motion where the District Court erroneously treated the stevedore's overpayments of compensation as though they were payments upon the judgment by the shipowner because of an indemnity contract between the stevedore and the shipowner, where the effect of said order deprives his counsel of a large part of his contingent fee which was to be based upon the sums recovered solely from the shipowner, and said order gives the stevedore a corresponding credit therefor against future compensation it would otherwise have to pay the longshoreman, and the District Court, in patent error, declares that the issues thus presented were previously decided and are res judicata?

CONSTITUTIONAL PROVISIONS

Constitution of the United States of America, Amendment 5, provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Jurisdiction of the United States District Court was based upon diversity of citizenship and an amount in controversy in excess of $10,000, exclusive of interest and costs, under 28 U.S.C. §1332, and upon admiralty and maritime jurisdiction under 28 U.S.C. §1333.

On April 17, 1968, Robert Benson (hereinafter referred to as "longshoreman") was severely and permanently injured while working for Atlantic & Gulf Stevedores, Inc. (hereinafter referred to as "stevedore") upon a ship owned by American Export Isbrandtsen Lines, Inc. (hereinafter referred to as "shipowner"). The longshoreman sued the shipowner who joined the stevedore as a third-party defendant, claiming indemnity. Prior to the trial, the stevedore and the shipowner settled the indemnity action. The stevedore agreed to defend the

shipowner and to pay one-third of any recovery by the longshoreman from the shipowner.

After a trial, post-trial motions, an appeal to the Court of Appeals for the Third Circuit, Benson v. American Export Isbrandtsen Lines, Inc., 478 F. 2d 152 (C.A. 3, 1973) and denial of the longshoreman's petition for certiorari by the Supreme Court, 414 U.S. 1145, 94 S. Ct. 898 (1974) final judgment was entered in favor of the longshoreman against the shipowner in the sum of $69,469.76, with interest from January 26, 1971, the date of the verdict, and costs were taxed April 19, 1974 at $1,393.54. When the longshoreman sought payment of the entire judgment, interest and costs the shipowner moved the District Court for leave to deposit into court $56,157.49, representing two-thirds of the judgment indebtedness, interest and costs. On June 5, 1974 the District Court granted the motion and ordered the deposit to be paid by the Clerk to the longshoreman.

In the meantime, the stevedore, purporting to act also for the shipowner, filed a motion in which it averred that it had disbursed compensation benefits totalling $23,061.21 to the longshoreman. It claimed a lien pursuant to 33 U.S.C. §933 in that amount, averring that the longshoreman contested the lien and praying that the judgment against the shipowner be marked satisfied upon payment of the judgment less the amount of the lien, interest on that remainder and the costs. The longshoreman answered this motion, asking for an accounting of the amount claimed by the stevedore and denying that in equity the stevedore was entitled to any lien because it had acted in the litigation against the shipowner in conflict with his interests. His Answer requested that the District Court enter an order permitting any payment into court any payor desired to be credited against the judgment, interest and costs, without prejudice to plaintiff's right to issue execution for the remainder until the entire sum due was paid; to further order that the Clerk shall pay all sums received immediately to plaintiff; and to declare and adjudge that the stevedore did not have any equitable lien or right to any portion

of the longshoreman's recovery. The stevedore then amended its motion, to which the longshoreman responded; then it filed a second amended motion. The longshoreman answered the second amended motion, demanding payment of the balance of the entire judgment, interest thereon and costs, and praying the Court to decree that the stevedore did not have any lien or right of subrogation against the recovery for the reasons previously set forth.

On these pleadings, and without a hearing, the District Court entered an order on April 11, 1975, that the stevedore was "entitled to receive or retain, from the proceeds of the judgment in this case, a sum equal to the amount of its compensation lien as of the date of entry of judgment, with interest thereon from the date of entry of judgment, plus the amount of any compensation paid to plaintiff since that date, with interest thereon from the date of payment. Upon payment to the plaintiff or deposit in the registry of the Court of the balance of the judgment, interest and costs, the judgment shall be marked SATISFIED". A copy of this order and the supporting memorandum is appended to this petition.

The longshoreman appealed from that order to the Court of Appeals, assigning as the sole question presented for review whether the district court erred in holding that the stevedore was entitled to subrogation in view of the stevedore's actions in conflict with the longshoreman's interests in the litigation against the shipowner. On January 13, 1976, the Court of Appeals entered the following judgment order, without opinion:

> "Appellant Benson, a longshoreman, contends that the district court erred in enforcing a lien on a judgment in his favor against American Export Isbrandtsen Lines, Inc., in favor of his employer, Atlantic & Gulf Stevedores, Inc., a stevedore. We find no error.
>
> "It is therefore ORDERED and

> ADJUDGED that the judgment of the district court is affirmed. Costs taxed against appellant."

This judgment order is not reported.

The District Court's order of April 11, 1975, did not stay execution upon the judgment of the longshoreman against the shipowner, and made no mention of the shipowner. It did not state how the judgment creditor (the longshoreman) was to collect "the proceeds of the judgment".

Counsel for the stevedore, still purporting to act for the shipowner as well as the stevedore, filed a "Motion to Stay Execution and to Mark Judgment Satisfied" giving rise to the present proceedings. The longshoreman filed an Answer, averring that the judgment should not be marked satisfied because it had not been fully paid due to the stevedore's interference with collection, and that if the present motion were granted it would prevent performance of the condition of his contingent fee contract which would entitle his counsel to the balance of his fee on the unpaid portion of the judgment as well as any balance owing to him. The longshoreman asked the District Court to order the shipowner to pay the unpaid balance of the judgment, interest and costs to him whereupon that judgment shall be marked satisfied, and after payment of the longshoreman's counsel fees and expenses, the longshoreman shall pay the stevedore's lien.

On July 12, 1978, without a hearing, the District Court entered the subject order staying execution and directing the Clerk to mark the judgment "satisfied". In its unreported Memorandum in support thereof, it asserted that all issues raised by the stevedore's motion and the longshoreman's answer "were discussed and decided in this Court's Memorandum and Order of April 11, 1975". [Emphasis supplied] The order and memorandum are printed in the appendix to this petition. In so stating, the District Court was patently mistaken. In those prior proceedings, the matter of the

priority of the right of the longshoreman's counsel to his fees and expenses upon the recovery was never raised by the motions and answers, never litigated, argued nor decided by the District Court. In its unreported memorandum of April 11, 1975, the District Court did discuss the decisions relating to the absence of liability of stevedores to pay a portion of the longshoremen's counsel fees in such cases, but stated:

> "The foregoing references to the issues of attorney's fees and allowance of interest have been included here for contextual purposes, and because the precedents on those issues provide at least some guidance in the issue involved in the present case."

Thus, the District Court, at that point in time, had clearly understood that the matter of counsel fees was not an issue then being decided. Thus, similar issues had been discussed but had not been decided by that memorandum and order.

The District Court went on to assert in its memorandum of July 12, 1978, "It is very clear that the full amount of the judgment, over and above the lien of the third-party defendant, has been paid to the plaintiff", thereby treating the stevedore's over-payments of compensation to the longshoreman until May 24, 1977, as though these were payments by the ship. However, the overpayments of compensation were not payments upon the judgment against the shipowner and counsel for the longshoreman had no right to be paid his contingent fee from such overpayments.

The longshoreman appealed from the order of July 12, 1978 to the Court of Appeals for the Third Circuit. On June 8, 1979, the Court of Appeals entered the following judgment order, without opinion:

> "After consideration of all contentions raised by the appellant, it is
>
> "Adjudged and Ordered that the judgment of the district court be and is hereby affirmed.
>
> "Costs taxed against appellant."

The judgment order is unreported to date. Petitioner petitions for a Writ of Certiorari to this Honorable Court to review that judgment order and the District Court's order and memorandum which it affirmed.

ARGUMENT

Petitioner and his counsel have been deprived of property without due process of law by the District Court's erroneous decision that the issues raised by the stevedore's Motion to Stay Execution and to Mark Judgment Satisfied, and the longshoreman's Answer thereto, were decided previously by the Court. If the order of the District Court of April 11, 1975, encompassed the issues presented by the subject motion and answer, neither the longshoreman nor his counsel were given notice of those issues by the prior motions and the answers thereto. They did not mention anything about the longshoreman's counsel fees and litigation expenses.

In Sylvan Beach, Inc. v. Koch, 140 F. 2d 852 (C.A. 8, 1944) the court said, at pp. 861-862:

> "A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved."

The court held that in the absence of notice to a party of the claim made against him and of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity, citing Ochoa v. Hernandez, 230 U.S. 139, 161, 33 S. Ct. 1033, 57 L. Ed 1427 (1913) and Postal Telegraph Cable Co. v. City of Newport, 247 U.S. 464, 476, 38 S. Ct. 566, 62 L. Ed. 1215 (1918) among other cases.

In Postal Telegraph Cable Co. v. City of Newport, the Supreme Court declared, at 247 U.S. 476:

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 48; Greenleaf Ev., §§522-523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor v. McVeigh, 93 U.S. 274, 277; Louisville & Nashville R.R. Co. v. Schmidt, 177 U.S. 230, 236; Simon v. Craft, 182 U.S. 427, 436."

As previously noted the District Court originally recognized that its order of April 11, 1975 was not deciding any issue pertaining to priority of counsel fees and expenses over a compensation lien or questions of interest in its supporting memorandum. It stated that the reference to Davis v. United States Lines Co., 253 F. 2d 262 (C.A. 3, 1958), deciding that a stevedore need not share payment of the longshoreman's counsel fees and expenses pro rata, and to Candiano v. Moore-McCormack Lines, Inc., 407 F. 2d 385 (C.A. 2, 1969), deciding that a longshoreman was entitled to interest only on his share of the recovery, were made for "contextual p rposes" and because they provided "some guidance on the issue involved in the present case". The sole issue decided then was whether the stevedore had forfeited its lien altogether. The order of April 11, 1975 held that the stevedore was entitled to receive payment of its compensation lien as of the date of entry of judgment against the shipowner, with interest from that date, plus the amount of any compensation paid to the longshoreman since that date, with interest. It further provided that upon paymentof any balance of the judgment, interest and costs to the plaintiff the judgment should be marked satisfied. The District Court failed to decide whether the longshoreman was entitled to the accounting for the amount of the claimed lien, as he requested.

Upon appeal from that order the sole question was whether the District Court erred in ruling that the stevedore had not forfeited its lien.

In view of the foregoing, the District Court's declaration in its memorandum of July 12, 1978, that "all of the issues raised by that Motion, and by plaintiff's strenuous opposition hereto, were discussed and decided in this Court's Memorandum and Order of April 11, 1975" was clearly mistaken.

The question presented to the Court of Appeals for the Third Circuit on appeal from the order of July 12, 1978, was whether the District Court erred in refusing to allow the longshoreman to issue execution for the full amount of his judgment, interest and costs against the shipowner, in refusing to direct payment therefrom of his counsel fees, costs and expenses of litigation, and, from the balance remaining, to the stevedore in partial payment of its lien with any unpaid balance to be credited against its liability for future compensation benefits until full credit for said lien has been obtained by the stevedore. The longshoreman pointed out, in his brief, that the District Court's assertion that the matter was res judicata was mistaken. Nevertheless, the Court of Appeals affirmed the District Court's order without an opinion.

By reason of the foregoing misapplication of the doctrine of res judicata, the lower courts have given a lien to the stevedore for its payments of compensation to the longshoreman after the date of the original judgment, January 26, 1971, until it stopped such payments on May 24, 1977. Since that increase in the lien to May 24, 1977 then approximated or exceeded the balance of the judgment, interest and costs due from the shipowner, the District Court stated in its memorandum of July 12, 1978:

> "It is very clear that the full amount of the judgment, over and above the lien of the third-party defendant, has been paid to plaintiff. Indeed, the lien exceeds the amount for which the third-party defendant is entitled to credit; that is, the third-party defendant will have the right to recoup additional sums by suspension of compensation payments for a further period."

By so holding, the District Court effectively allowed the stevedore to reduce the longshoreman's verdict and judgment from $69,469.76 to $45,768.55, with interest on the latter sum of $8,995.40 and costs of $1,393.54, which composed the shipowner's deposit into court of $56,157.49. It treated overpayments of compensation by the stevedore as though they were payments by the shipowner against the judgment, but, at the same time, allowed the stevedore to recoup those overpayments by way of credits against its future liability to pay compensation. In consequence of this treatment, counsel for the longshoreman is deprived of that portion of his contingent fee to which he should have been entitled upon collection of the entire judgment he obtained in this action, and the stevedore is given the amount of that fee as credit against future compensation it would otherwise owe.

The reason for this outcome is that counsel for the longshoreman was only entitled to be paid a contingent fee on the recovery from the shipowner. He was not entitled to any fee because of payments of compensation to the longshoreman by the stevedore, whether they were erroneous overpayments or not.

Due process of law inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or opportunity for a hearing. Ochoa v. Hernandez Y. Morales, 230 U.S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033 (1913). One who acquires rights by way of an administrative or judicial proceeding cannot be deprived of them without notice and opportunity to be heard. Garfield v. U.S., 211 U.S. 249, 53 L. Ed 168, 29 S. Ct. 62 (1908).

Had the District Court permitted collection of the judgment by execution in the usual, customary mode of procedure when the judgment became final after the first appeal to the Court of Appeals was decided and the shipowner made its partial payment on June 10, 1974, the following distribution could have been made:

Judgment		$69,469.76
Interest thereon from 1/26/71 to 6/10/74		14,241.30
Costs taxed		1,393.54
Total judgment debt		$85,105.60
Less: Lien of Counsel for Longshoreman:		
Costs and Expenses	$ 3,951.09	
Counsel fee, 1/3 of Net Recovery	$27,051.50	$31,002.50
Longshoreman's Distributive Share:		$54,103.10
Less: Lien of Stevedore as of 6/10/74:		
Compensation Benefits Paid	$21,597.76	
Approximate Interest thereon from 1/26/71 (overestimated on lump sum, since payments were actually paid weekly)	$ 4,373.53	$25,971.29
Net amount due to longshoreman		$28,131.81(+)

The stevedore would have been compelled to resume payments of compensation after its liability for future compensation benefits equalled $28,131.81, the net amount received by the longshoreman. Nacirema Operating Co. v. Oosting, 456 F. 2d 956, 1972 A.M.C. 1517 (C.A. 4, 1972) cert. den. 409 U. S. 580; Stark v. Shell Oil Co., 450 F. 2d 994 (C.A. 5, 1971); Voris v. Gulf Tide Stevedores, 211 F. 2d 549 (C.A. 5, 1954); Senate Report No. 428 to 1959 Amendment of the Act: "The bill, as amended, provides

that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery", U.S. Code Cong. and Admin. News, p. 2135 (1959). However, under the lower courts' decisions, counsel for the longshoreman will receive only $21,353.22 for his contingent fee and expenses, or $9,649.28 less than he would otherwise have been entitled to receive, while the stevedore will get credit against its future liability for compensation for its lien as of June 10, 1974 and overpayments of compensation from June 10, 1974 until May 24, 1977, totalling $10,780.00.

The refusal of the District Court to correct this injustice on the mistaken notion that the matter was res judicata and the affirmance of that decision by the Court of Appeals, deprives petitioner and his counsel of their property without due process of law in that it deprived them of all remedy for enforcement of their rights. Compare Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 682, 74 L. Ed. 1107, 50 S. Ct. 451 (1930).

CONCLUSION

The lower courts have failed to permit enforcement of a District Court judgment for damages in the usual, customary manner by execution process, and by so doing, have deprived petitioner and his counsel of a portion of their interests in that judgment. Petitioner prays that a Writ of Certiorari issue to review the procedure followed by the District Court and approved by the Court of Appeals, and to clarify the correct mode for collection of judgments in longshoremen's personal injury cases and determining the priorities of the lien of counsel for the longshoreman and the lien of the stevedore where the recovery is sufficient to pay both liens.

Respectfully submitted,

George J. O'Neill

Suite 1600 Broad-Locust Bldg.
1405 Locust Street
Philadelphia, Pa. 19102
(215) 735-7665

Counsel for Petitioner
Robert J. Benson

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2213

ROBERT J. BENSON,
Plaintiff-Appellant

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.
Defendant-Appellee

v.

ATLANTIC & GULF STEVEDORES, INC.,
3rd Party Defendant-
Appellee

(Civil No. 68-1387, E.D. of Pa.)

Argued June 5, 1979

Before: WEIS and GARTH, Circuit Judges and MEANOR*, District Judge.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

Attest:

M Elizabeth Ferguson
Chief Deputy Clerk

By the Court,

Weis
Circuit Judge

DATED: June 8, 1979

* Honorable H. Curtis Meanor, United States District Court for the District of New Jersey, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on July 2, 1979.

Test: M Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Costs taxed in favor of appellee, Atlantic & Gulf Stevedores, Inc., as follows:

Brief.....$292.50

COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. BENSON	:	CIVIL ACTION
v.	:	
AMERICAN EXPORT ISBRANDTSEN LINES, INC.	:	
	:	
v.		
	:	
ATLANTIC & GULF STEVEDORES, INC.	:	NO. 68-1387

O R D E R

AND NOW, this 12th day of July, 1978, it is ORDERED:

1. That the Motion of the third-party defendant, Atlantic & Gulf Stevedores, Inc., to stay execution and to mark judgment satisfied, is GRANTED.

2. The Clerk is directed to mark the judgment in this case "SATISPIED."

J.

IN THE UNITED STATES DISTRICT COURT /

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

8/10

ROBERT J. BENSON	:	CIVIL ACTION
v.	:	
AMERICAN EXPORT ISBRANDTSEN LINES, INC.	:	
	:	
v.		
	:	
ATLANTIC & GULF STEVEDORES, INC.	:	NO. 68-1387

JUL 13 1978

MEMORANDUM AND ORDER

FULLAM, J. July 12, 1978

Since its inception, this litigation has tended to generate more heat than light, a circumstance which has not facilitated the expeditious decision of third-party defendant's "Motion to Stay Execution and to Mark Judgment Satisfied." In actuality, however, all of the issues raised by that Motion, and by plaintiff's strenuous opposition thereto, were discussed and decided in this Court's Memorandum and Order of April 11, 1975, which was affirmed by the Court of Appeals for the Third Circuit by a Judgment Order entered January 13, 1976 (No. 75-1642).

That Order provides:

> "AND NOW, this 11th day of April, 1975, it is ORDERED that Atlantic & Gulf Stevedores, Inc. is entitled to receive or retain, from the proceeds of the judgment in this case, a sum equal to the amount of its compensation lien as of the date of entry of judgment, with interest thereon from the date of entry of judgment, plus the amount of any compensation paid to plaintiff since that date, with interest thereon from the date of payment. Upon payment to the plaintiff, or deposit in the registry of this Court, of the balance of the judgment, interest and costs, the judgment shall be marked SATISFIED.
>
> "John P. Fullam, J."

It is very clear that the full amount of the judgment, over and above the lien of the third-party defendant, has been paid to the plaintiff. Indeed, the lien exceeds the amount for which the third-party defendant is entitled to credit; that is, the third-party defendant will have the right to recoup additional sums by suspension of compensation payments for a further period. Final adjustment of the account, between plaintiff and the third-party defendant, is within the province of the compensation authorities, and not this Court.

It is obvious that plaintiff's real quarrel is with the rule of Davis v. United States Lines Co., 253 F.2d 262 (3d Cir. 1958), and with this Court's Order of April 11, 1975, and the Court of Appeals Order of affirmance. The Motion of the third-party defendant must be granted.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 75-1642

ROBERT J. BENSON,
Appellant

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

v.

ATLANTIC & GULF STEVEDORES, INC., 3rd pty deft.

(D.C. Civil Action No. 68-1387)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
January 12, 1976
Before HASTIE, GIBBONS and ROSENN, Circuit Judges

George J. O'Neill, Esq.
Suite 1600
1405 Locust Street
Philadelphia, Pennsylvania 19102
Attorney for Appellant

John P. Penders, Esq.
Charles W. Craven, Esq.
Marshall, Dennehey & Warner
1515 Locust Street
Philadelphia, Pennsylvania 19102
Attorneys for Atlantic & Gulf Stevedores, Inc

J U D G M E N T O R D E R

Appellant Benson, a longshoreman, contends that the district court erred in enforcing a lien on a judgment in his favor against American Export Isbrandtsen Lines, Inc., in favor of his employer, Atlantic & Gulf Stevedores, Inc., a stevedore. We find no error.

It is therefore O R D E R E D and A D J U D G E D that the

judgment of the district court is affirmed. Costs taxed against appellant.

By the Court,

Circuit Judge

Attest

Thomas F. Quinn
Clerk

Dated: JAN 13 1976

Certified as a true copy and issued in lieu of a formal mandate on February 4, 1976.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellee, Atlantic & Gulf Stevedores, Inc., as follows:

Brief.....$413.09

COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. BENSON	:	CIVIL ACTION
v.	:	
AMERICAN EXPORT ISBRANDTSEN LINES, INC.	:	
v.	:	
ATLANTIC & GULF STEVEDORES, INC.	:	NO. 68-1387

O R D E R

AND NOW, this 11th day of April, 1975, it is ORDERED that Atlantic & Gulf Stevedores, Inc. is entitled to receive or retain, from the proceeds of the judgment in this case, a sum equal to the amount of its compensation lien as of the date of entry of judgment, with interest thereon from the date of entry of judgment, plus the amount of any compensation paid to plaintiff since that date, with interest thereon from the date of payment. Upon payment to the plaintiff, or deposit in the registry of this Court, of the balance of the judgment, interest and costs, the judgment shall be marked SATISFIED.

J.

ROBERT J. BENSON : CIVIL ACTION

v. :

AMERICAN EXPORT ISBRANDTSEN LINES, INC. :

v. :

ATLANTIC & GULF STEVEDORES, INC.: NO. 68-1387

MEMORANDUM AND ORDER

FULLAM, J. April ||, 1975

In Benson v. American Export-Isbrandtsen Lines, Inc., 478 F.2d 152 (1973), the Court of Appeals remanded this case for the entry of judgment in the full amount of the plaintiff's damages, $69,469.76, without reduction for contributory negligence. The issue now before this Court is the extent to which the judgment is subject to a lien for compensation paid to the plaintiff under the Longshoremen's and Harbor Workers Act, 33 U.S.C. §§1901 et seq.

In its original form, that statute contemplated an election by an injured employee as to whether to collect compensation benefits from his employer pursuant to the Act, or to pursue a claim for damages against third parties. Acceptance of benefits under the Act had the effect of assinging to the employer the injured workman's claims against third parties. If the employer pursued this assigned cause of action and obtained a recovery, the employer was entitled to retain therefrom (a) reimbursement of the costs of litigation, including attorney's fees, (b) reimbursement of benefits paid, (c) reimbursement of the present value of future benefits payable under the Act, and

(d) 20% of the recovery; only the balance was then payable to the employee. If, however, the employer did not seasonably pursue the assigned claim, the injured workman could file suit in his own name, and the recovery would then be credited against the employer's liability for compensation under the Act. Czaplicki v. S.S. Hoegh Silver Cloud, 351 U.S. 525 (1956); Johnson v. Sword Line, Inc., 257 F.2d 541 (3d Cir. 1968).

In 1959, the statute was amended so as to remove the necessity for an election by the employee. Under the present law, 33 U.S.C. §933, the injured workman may accept compensation payments without prejudice to his right to bring suit against third parties for damages, provided the suit is filed within six months after the date of injury. However, the employer is entitled to subrogation, to the extent of benefits actually paid; and this right of subrogation gives rise to a lien against the proceeds derived from the third-party litigation.

At least three sets of problems can arise in attempting to apply the principles discussed above: (1) if the plaintiff succeeds in recovering against a third party, is a proportionate share of the expense of litigation allocable to, and deducted from, the employer's share of the recovery? The law in this

circuit is that the employer is entitled to full payment of its lien, without deduction of attorney's fees and costs, at least in cases where the total recovery from third parties exceeds the total compensation payable by the employer. Davis v. United States Lines Co., 253 F.2d 262 (3d Cir. 1958) (2) If the proceeds of the third-party judgment include interest from the date of judgment, is a pro rata share of that interest allocable to the employer's share of the judgment? Appellate authority on this point is meager, but seems to establish that the employer's lien attaches as of the date of entry of judgment, hence the employer is entitled

to a pro rata amount of interest, and the plaintiff-employee is entitled only to the interest on that part of the judgment which exceeds the employer's lien. Candiano v. Moore-McCormack Lines, Inc., 407 F.2d 385 (2d Cir. 1969).

(3) Can the employer's right of subrogation be terminated because of his "inequitable" conduct, and if so, what kinds of conduct on the part of the employer suffice to produce that result? It is this issue which is primarily involved in the present case. The foregoing references to the issues of attorney's fees and allowance of interest have been included here for contextual purposes, and because the precedents on those issues provide at least some guidance on the issue involved in the present case.

In essence, plaintiff contends that the employer has forfeited its subrogation rights in this case because, instead of cooperating with the plaintiff, or at least remaining neutral, the employer joined forces with the third party, assumed the defense of plaintiff's claim, and strove mightily to minimize plaintiff's recovery.

The facts are not in dispute. Plaintiff was working as a longshoreman, loading cargo. He was injured when one of the boards of a hatch cover on which he was standing gave way, and plaintiff dropped part way through the resulting hole. Plaintiff brought suit against the shipowner, claiming unseaworthiness; the shipowner then joined the employer as a third-party defendant, seeking indemnity under its contract for workmanlike service.

Before trial, the indemnity claim was settled. As between the shipowner and the employer, it was agreed that the employer would pay one-third of any recovery by plaintiff, and would assume the defense of the entire lawsuit. At trial, the unseaworthiness of the vessel was conceded. The defense efforts

were directed solely to attempting to establish that plaintiff was guilty of contributory negligence, and to minimize the amount of plaintiff's damages.

Initially, the jury found that plaintiff was guilty of contributory negligence, to the extent of 20%. Plaintiff's total damages were fixed inthe sum of $69,469,76, which, when reduced by reason of the 20% contributory negligence finding, resulted in a net verdict of $55,576.76. On appeal, the Court of Appeals concluded that there was insufficient evidence of contributory negligence to go to the jury, and directed reinstatement of the entire award, without reduction. Benson v. American Export-Isbtandtsen Lines, Inc., supra.

In addition to citing the generally adversary stance assumed by the employer in this litigation, plaintiff charges the employer with acting in bad faith in two particulars: In attempting to inject the issue of plaintiff's contributory negligence, when there was no evidence to support such a finding; and in using certain information in its compensation files to impeach plaintiff's credibility on the issue of damages. On the latter point, it appears to be plaintiff's contention not only that the information should not have been used at all, but that the wording of the cross-examination in which the information was used improperly and unnecessarily revealed to the jury the fact that compensation was being paid.

The gist of plaintiff's argument is that subrogation is an equitable doctrine, and its assertion is subject to equitable defenses; and that considerations of equity and fair dealing require that, in the present case, the employer should be precluded from asserting its subrogation rights.

However, the circumstances of the stevedore-employer clearly distinguish this case from the cases cited by the plaintiff.

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Here, the stevedore was charged with liability for indemnity, pursuant to its contract with the shipowner. It was faced with the possibility that the litigation might result in the imposition of liability far in excess of its liability under the compensation statute. The stevedore could properly defend itself against the imposition of any such liability. It might have done so by exonerating itself from the breach of contract charge, or by contesting the merits of plaintiff's original claim against the shipowner, including the amount of plaintiff's damages; or it could have pursued both of these courses of action. Surely, plaintiff should not be permitted to control the stevedore's choice of strategy. And I am not persuaded that the settlement arrangement between the stevedore and the shipowner can be regarded as eliminating any of the stevedore's strategic choices.

Specifically, I see no impropriety in the stevedore's using information from its own compensation file in defending itself, even though such defense might (and, in this case, because of the settlement agreement, obviously did) also aid the ship-

owner in its defense. It should be noted that the Court of Appeals found no error in the manner in which this material was used. And I have difficulty in finding support for a charge of bad faith by reason of the assertion of a claim of contributory negligence, when the jury found such contributory negligence on evidence believed adequate by this Court and by the dissenting judge in the Court of Appeals.

The Longshoremen's and Harbor Workers Act provisions governing the employer's rights of subrogation focus primarily upon guaranteeing to the employee, as a minimum, the payments provided by the Act; enabling the employee, if he chooses, to sue third parties for additional damages; and making sure that the employee does not obtain a double recovery of any portion of his damages.

As the statute has been interpreted by the courts, it can be characterized as evincing a congressional intent to exact from the employee a small price: in exchange for the assurance of absolute liability of his employer for compensation payments, the employee who desires to seek damages from third parties is required to bear the full brunt of attorney's fees and litigation expenses involved in the attempt, and to run the risk that his employer, in protecting its own interests, may make his recovery from third parties more difficult.

Counsel for plaintiff has cited only one case in which a right of subrogation was denied in a context somewhat analagous to the present case. In Arendas v. Rich & Co., 220 F.Supp. 957 (W.D. Pa. 1963), a case arising under the Pennsylvania Workmen's Compensation Act, the injured employee brought suit against a third party for damages, and his employer was joined as an additional defendant. The verdict was against the plaintiff, and neither of the defendants sought a new trial. Plaintiff did seek a new trial, whereupon his claim was settled, for a modest sum, by the original defendant. The court refused to recognize any lien against the settlement proceeds for workmen's compensation payments. While the opinion can be interpreted as holding that the employer's failure to cooperate with the plaintiff in his attempt to recover from the third party barred assertion of a lien, it can also be interpreted as holding that the employer waived its lien by acquiescing in a verdict which would have denied recovery altogether. More importantly, the case was before the court for approval of the settlement agreement; actually, all that was decided was that the court would not have approved the settlement as fair except as a settlement net of lien. Moreover, under Pennsylvania law, the liability of an employer for contribution cannot exceed the statutory liability under the Workmen's Compensation Act. O'Neill v. U.S., 450 F.2d 1012

(3d Cir. 1971). It is thus more difficult to justify actions on the part of a Pennsylvania employer which are adverse to the employee, than in cases, such as the present case, where the employer's potential liability is not so limited.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-384.

ROBERT J. BENSON,

Petitioner,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent,

v.

ATLANTIC & GULF STEVEDORES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION.

CHARLES W. CRAVEN,
MARSHALL, DENNEHEY & WARNER,
1515 Locust Street,
Philadelphia, PA 19102
(215) 893-3826

Attorneys for Respondent,
Atlantic & Gulf Stevedores, Inc.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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BRIEF IN OPPOSITION.

Respondent Atlantic & Gulf Stevedores, Inc. files this brief in opposition to the petition for writ of certiorari filed by petitioner Robert J. Benson and respectfully suggests that the petition be denied.

COUNTER-STATEMENT OF THE QUESTION PRESENTED.

Did the district court and the court of appeals correctly decide, in this maritime personal injury action which arose before the effective date of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, that, after being paid the compensation benefits to which he was entitled and that portion of the judgment against the ship in excess of those payments, and after unsuccessfully claiming previously in the district court and in the court of appeals that the balance of the judgment should be paid to him because the employer had waived or forfeited its compensation lien, the employee and his attorney may not then insist upon payment of the subrogated balance of the judgment so that the attorney can extract a fee from it, when the employee and his attorney did not raise the attorney's lien in the original challenge to the employer's subrogation claim, when the employee and his attorney recognize that the attorney is not entitled to a fee on the employer's share of the judgment, and when the employee and his attorney no longer contest the district court's order which permitted the employer to receive or retain a sum equal to its lien from the proceeds of the judgment?

CONSTITUTIONAL PROVISIONS.

Petitioner claims that the decisions of the lower courts violated the due process clause of the Fifth Amendment to the United States Constitution. The Amendment is reproduced in full at page 3 of the Petition for Writ of Certiorari. Respondent believes that due process has been afforded to petitioner and his attorney and that this matter presents no occasion appropriate for review by this Honorable Court.

COUNTER-STATEMENT OF THE CASE.

Respondent accepts petitioner's statement of the case as accurate up to the time of this Court's denial of his first petition for writ of certiorari in 1974. Petitioner's presentation of subsequent events compels a counter-statement to make it clear that the lower courts reached the correct result because petitioner's claim, that the subrogated portion of the verdict should first have been paid to him so that his attorney could extract a fee from it before paying the balance to the employer, has no merit, because the claim was waived when it was not raised at the time respondents sought to have the judgment marked satisfied after only the portion of the judgment in excess of the amount of the employer's compensation lien plus interest and costs was paid, and because the approach advanced by petitioner would have resulted in less money for the employee, more expenditures by the employer, and the collection of an additional fee by the employee's attorney to be paid from and claimed for the recovery of a sum to which the employer alone was entitled.

On March 25, 1974, American Export and A&G filed a joint motion seeking leave for American Export to

deposit into court a sum equal to the full amount of plaintiff's costs and the amount of the verdict in excess of A&G's compensation payments with interest on that excess amount, and to have the judgment marked satisfied when that was done. In response to this motion, plaintiff asserted that A&G had waived or forfeited its lien by defending the ship at trial and that he was entitled to interest on the full amount of the reinstated verdict. He then asked the district court "to enter an order permitting payment into Court any sum that defendant or any other person or entity asking for it wish to have credited against the judgment, interest and costs due the plaintiff, without prejudice to plaintiff's right to issue execution for the remainder until the entire sum due is paid; and to further order that the Clerk shall pay all sums received immediately to plaintiff; and to declare and adjudge that Atlantic & Gulf Stevedores, Inc., is not entitled to be subrogated to and does not have any equitable lien or other right to any portion of plaintiff's recovery". On April 3, 1974, the joint motion was amended to reflect adjustments of the amounts at issue necessitated by the additional compensation payments made by A&G to plaintiff. In response to the amended motion plaintiff raised the same challenges and the same prayer for relief asserted in his original answer. Although the joint motion and the amendment asked that the judgment be marked in full when only the excess portion, interest and costs were paid to plaintiff, plaintiff never claimed that the balance should also be paid to him so that his attorney could extract a fee from it.

Because of the dispute between the employer and employee concerning the asserted compensation lien, the ship's own counsel filed a motion to permit the ship to deposit the sum of $56,157.49 into court in partial payment of the $69,469.76 verdict and of the costs and interest at

issue.[1] In his answer to this motion, plaintiff stated that he did not oppose the motion, requested that American Export's proposed order be supplemented by a provision for immediate payment of the deposit by the clerk to plaintiff, and averred "that the balance of the judgment, interest and costs due to him after the payment of the amount proposed by defendant is more than sufficient to pay the entire amount claimed by [the employer] in reimbursement of its payments of compensation benefits if that claim should be sustained by the court". The sum proposed by the ship and welcomed by plaintiff was sufficient to pay plaintiff's costs in full, the difference between the amount of the verdict and the amount of the employer's compensation lien asserted in the April 3, 1974 amendment to the joint motion, plus interest to date on that difference.[2] On June 5, 1974 the district court entered an order allowing American Export to deposit the proposed sum into court and directing its immediate repayment by the clerk to plaintiff. The deposit was made and plaintiff was paid $56,157.49 on June 10, 1975.

On November 25, 1974 the original joint motion seeking to have the judgment marked satisfied was again amended and supported by another affidavit from the employer. Plaintiff opposed this motion for the reasons he originally raised, including his claim to interest on the full amount of the verdict. Even with this third opportunity to do so, plaintiff again did not claim that even if the employer's lien were upheld, the subrogated amount

1. Although page 4 of the Petition for Writ of Certiorari suggests that the ship's motion was filed before the joint motion and the first amended joint motion, the district court docket indicates that the joint motion and plaintiff's answer were filed on March 25, 1974, and the ship's motion, plaintiff's answer to the ship's motion, and plaintiff's answer to the first amended joint motion were filed on April 10, 1974.

2. Contrary to petitioner's suggestion (Petition, p. 4), the amount was not determined on the basis of two-thirds of the judgment.

at issue should first be paid to him so that his attorney might extract a fee from it before paying the balance to the employer.

On April 11, 1975, in response to the joint motion, the district court entered this order:

> "And now, this 11th day of April, 1975, it is ordered that Atlantic & Gulf Stevedores, Inc. is entitled to receive or retain, from the proceeds of the judgment in this case, a sum equal to the amount of its compensation lien as of the date of entry of judgment, with interest thereon from the date of entry of judgment, plus the amount of any compensation paid to plaintiff since that date, with interest thereon from the date of payment. Upon payment to the plaintiff, or deposit in the registry of this Court, of the balance of the judgment, interest and costs, the judgment shall be marked satisfied".

In its as-yet unpublished supporting memorandum (reproduced in the appendix to the Petition for Writ of Certiorari, the district court held that (1) the employer is entitled to full payment of its lien, without deduction of attorney's fees and costs, at least in cases where the total recovery from third parties exceeds the total compensation payable by the employer, (2) the employee is entitled to post-judgment interest only on that portion of the judgment which exceeds the employer's lien, and (3) the employer did not waive or forfeit its lien in this case.

On May 9, 1975, plaintiff again appealed to the Third Circuit (No. 75-1642; "Benson II"), claiming only that the district court erred in holding that A&G had not waived or forfeited its lien. On January 13, 1976, the court of appeals entered a judgment order without opinion stating,

> "Appellant Benson, a longshoreman, contends that the district court erred in enforcing a lien on a judg-

ment in his favor against American Export Isbrandtsen Lines, Inc., in favor of his employer, Atlantic & Gulf Stevedores, Inc., a stevedore. We find no error.

"It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs taxed against appellant".

The third appeal ("Benson III"), the target of the petition for certiorari, arises from a motion filed by A&G's attorney on June 22, 1977 to stay execution and mark the judgment satisfied. The motion was supported by an affidavit from A&G's claims manager establishing that the employer's compensation lien totalled $37,105.21 as of March 22, 1977. A&G sought an order staying execution, marking the judgment completely satisfied, and "acknowledging a credit on future compensation benefits in favor of the employer in the amount by which its LHWCA payments plus interest thereon exceed the unpaid verdict balance". Plaintiff opposed this motion and asked the district court to issue an order

". . . that [American Export] shall pay the balance of the judgment, interest and costs to plaintiff whereupon the subject judgment shall be marked satisfied, and after payment of the counsel fees and other proper charges of counsel for plaintiff, plaintiff shall pay the balance of said recovery to [A&G] to be credited against its proper charges for compensation and medical expense benefits paid to plaintiff, pursuant to its right of subrogation, and to order that any balance thereof remaining due after said payment, shall be repaid by plaintiff in the form of credits to [A&G] against future compensation benefits as they become payable to plaintiff until [A&G] has received full credit for all sums now due".

The purpose of plaintiff's prayer was to permit his attorney to recover and keep one-third of the outstanding amount as part of his contingent fee. Plaintiff's answer to the motion was accompanied by an affidavit from his attorney regarding his fee arrangement and stating that the $56,157.49 paid by the ship in 1974 "was distributed as follows: total costs and expenses, $3,951.09; counsel fee, 33⅓% of net recovery, $17,402.13; net proceeds to client, $34,804.27".[3]

On July 14, 1978, the district court entered an order granting A&G's motion and directing the clerk to mark the judgment satisfied. In its supporting memorandum, the district court held that the issues raised in this motion had been decided in *Benson II*, that "it is very clear that the full amount of the judgment, over and above the lien of the third-party defendant [A&G], has been paid to the plaintiff," and that A&G was entitled to a credit, with the final adjustment of the compensation account left to the compensation authorities. The case was argued before a three-judge panel of the court of appeals on June 5, 1979, and on June 8, 1979, the court entered a judgment order affirming the district court. Without asking for either a panel or an en banc rehearing by the court of appeals, plaintiff then filed this Petition for Writ of Certiorari, claiming that the district court and the court of appeals deprived him and his attorney of property without due process by holding that the issue had been resolved by the district court's April 11, 1975 order which was affirmed on appeal. For the reasons that follow, A&G believes that the result reached below was correct, that neither petitioner nor his attorney have been deprived of property, and that the petition for writ of certiorari should be denied.

3. If the approach outlined at page 12 of the Petition for Writ of Certiorari had been followed, the employee would have received $6,672.74 less than he did.

COUNTER-ARGUMENT.

From March 25, 1974, when the district court received the employee's answer to the joint motion seeking to have the judgment marked satisfied upon payment into court of a sum equal to the difference between the amount of the judgment and the amount of the employer's lien plus interest on that difference and the employee's record costs, to April 11, 1975, when the district court entered its order allowing the employer to retain from the judgment a sum equal to the amount of its compensation payments plus interest, and allowing the judgment to be marked satisfied when the employee had been paid the balance of the judgment, petitioner and his attorney had ample opportunity to raise their contention that the entire amount of the judgment should first be paid to him so that the attorney could extract a fee and then pay whatever might be left over to the employer. The joint motion, the amended joint motion, and the second amended joint motion, particularly the prayers for relief in those motions, made it clear that respondents were seeking to have that judgment marked satisfied upon payment of less than the face amount of the judgment. The prayer for relief in the joint motion stated:

> "WHEREFORE, defendant and third party defendant pray that this Honorable Court issue an Order pursuant to 28 U. S. C. § 2041 and F. R. C. P. 67 ordering defendant American Export Isbrandtsen Lines, Inc. to pay into the Court the sum of $46,408.55 plus interest at 6 percent from January 26, 1971 on the said sum, plus $1,393.54 in costs, and that upon payment of said sum the Clerk of this Honorable Court be ordered to mark the judgment in favor of Robert Benson against American Export Isbrandtsen Lines, Inc., in the amount of $69,469.76 satisfied."[4]

Although petitioner and his attorney opposed the motions by claiming interest on the entire amount of the judgment and by challenging the viability of the employer's lien, they did not suggest a different procedure from that sought by the motions.

The effect of an order granting these prayers for relief upon the contingent fee agreement between the employee and his attorney should have been obvious to the attorney: his client would never be paid the full amount of the judgment against the ship and he would not be able to charge his fee against the full amount of the verdict. Rather than showing that the employee and his attorney were deprived of property without due process of law, the record in this case clearly indicates that the employee and his attorney each received what was legally due to him, and that the payment and satisfaction procedure was established by the April 11, 1975 order with full notice to the employee and his attorney of that procedure and with full opportunity for them to object to that procedure.

When the employee's attorney received the amended joint motion and the ship's motion to deposit the sum of $56,157.49 in court, it should have been obvious to him that his client would not be entitled to more than that sum, since it represented the difference between the amount of compensation he had been paid and the verdict plus interest on that difference and his record costs, unless the employee successfully contested the interest, lien, and satisfaction claims raised by the joint motions. As the

4. The prayers for relief in the amended and second amended motions are identical to this except for the first dollar figure which decreases in each amendment.

employee's attorney recognizes in this Court (Petition for Writ of Certiorari, p. 11), the amount proposed by the ship was the sum of $45,768 55 toward the verdict, plus interest on that amount, plus $1,393.54 toward the costs. That amount is the exact amount proposed by the amended motion's prayer for relief to be paid in satisfaction of the judgment. Nevertheless, the employee and his attorney accepted this amount from the ship and did not challenge the satisfaction and payment procedures of the three joint motions.

Neither petitioner nor his attorney were deprived of property without due process not only because they had notice and the opportunity to be heard, but also because their claim runs contrary to the position they took in the court of appeals, and contrary to the interests of the employee and the employer as defined in the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") (33 U. S. C. § 933).

Under the terms of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) (33 U. S. C. § 933), it is clear that a plaintiff longshoreman cannot retain both a jury verdict against a ship and the compensation benefits paid or payable by his employer in their full amounts, *The Etna*, 138 F. 2d 37 (3 Cir. 1943); *Johnson v. Sword Line*, 257 F. 2d 541 (3 Cir. 1958); *Brown v. Ivarns Rederi A/S*, 545 F. 2d 854, 859 n. 6 (3 Cir. 1976). Where, as in this case, the jury verdict exceeds the amount of compensation benefits paid by the employer, the employer is entitled to the full amount of its payments plus interest, and the employee is entitled only to the excess verdict amount; the employee bears his own litigation costs and, because there is no agreement so providing, the employer has no obligation to pay the employee's attorney a fee based upon the amount of

compensation payments, *Davis v. U. S. Lines Co.*, 253 F. 2d 262 (3 Cir. 1958); *see also, Haynes v. Rederi A/S Aladdin*, 362 F. 2d 345 (5 Cir. 1966); *Ballwanz v. Tarka Corp. of Baltimore*, 382 F. 2d 433 (4 Cir. 1967); *Lamar v. Admiral Shipping Corp.*, 476 F. 2d 300, 302 (5 Cir. 1973); *Cella v. Partenreederi MS Ravenna*, 529 F. 2d 15 (1 Cir. 1975); *Sessler v. Allied Towing Corp.*, 538 F. 2d 630, 633 (4 Cir. 1976). In apparent recognition of these principles, the employee stated to the court of appeals that he is not contending that the stevedore must share ratably in payment of plaintiff's counsel fees as was the case in *Davis v. U. S. Lines Co.*, 253 F. 2d 262 (C. A. 3, 1958)" (Brief for Appellant at 19), and that he "has no quarrel with the rule of *Davis v. U. S. Lines Co., supra,* nor with [the district court's] order of April 11, 1975, and its affirmance by this court" (*Id.*, p. 20).

The April 11 order, with which petitioner had no dispute, provided explicitly that the judgment could be marked satisfied when he had been paid the difference between the amount of the verdict, interest and costs and the amount of compensation payments. The effect of this order was to preserve to the employer and the employee the amounts that they were then entitled under the principles applicable to this case and in complete harmony with *Davis, supra.* This result was achieved when, pursuant to the June 5, 1974 order with which petitioner also had no dispute, petitioner had been paid his costs in full, the difference between the amount of the verdict ($69,469.76) and the record amount of the lien ($23,701.21), and interest on that difference from the date of judgment, when the ship paid its $56,157.49:

verdict	$69,469.76
less record lien	(23,701.21)
employee's portion of verdict	45,768.55
plus taxed costs	1,393.54
plus interest on employee's portion of verdict	8,995.40
Total	$56,157.49

By conceding in the court of appeals that the employer was entitled to its lien, that the employer did not owe a fee to the employee's attorney for the recovery of that lien, and that the attorney's contingent fee agreement with the employee did not entitle him to "any fee because of payments of compensation to the longshoreman by the stevedore, whether they were erroneous overpayments or not" (Petition for Writ of Certiorari, p. 11), petitioner and his attorney actually conceded that they were not entitled to anything more than what they had been paid. Petitioner had been paid all but $23,701.21 of the judgment against the ship. That sum was the amount of the employer's lien as of March 26, 1974. Obviously, that lien could not have been discharged if the employee's attorney extracted a fee from that sum.

It is equally obvious that petitioner would have realized less than he has if the procedure advanced by his Petition for Writ of Certiorari (p. 12) were followed. Instead of the $34,804.27 that he received from the ship's payment of $56,157.49, petitioner would have realized only $28,131.81 from a payment of $85,105.60.

CONCLUSION.

The procedure that petitioner wants this Honorable Court to review complied with the LHWCA and realized the most for the employee and the employer from the judgment against the ship. The procedure was a practical and frequently applied method of settling the employer's compensation lien. There is no need for this Honorable Court to review that procedure because both petitioner and his attorney have been afforded due process of law.

Respectfully submitted,

CHARLES W. CRAVEN,
MARSHALL, DENNEHEY & WARNER,
Attorneys for Respondent,
Atlantic & Gulf Stevedores, Inc.